Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

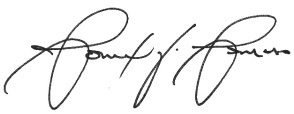
A Newsletter for Employers and Claims Professionals — *November 2018*

A Word From The Practice Chair

I do hope everyone out there survived their Thanksgiving food coma (and is ready to get right back at it as the holidays keep rolling along!). Welcome to the Holiday Season! For those of you in the Midwest we need to remind ourselves this is not the normal weather pattern. It feels like February around here. Too much cold coming in way too fast this year. So, I hope everyone is keeping warm and ready for another edition of the Heyl Royster Workers' Compensation Newsletter *Below the Red Line*.

My partner Brad Peterson has taken the line of questioning one step further in the complicated area of Medicare compliance. The first question is always whether or not Medicare has an interest which you must protect in your case. Brad then answers the next level of questions. If Medicare does have an interest, what can (and should) be done to protect all interested parties, mitigating those "damages" or MSA expenses, while still accounting for Medicare's interests. Brad has proven himself to be an expert in this field for many years and his opinions are sought after based upon his expertise. I am confident you will find his article helpful as you tackle your workers' compensation claims.

Finally, I want to remind you the Heyl Royster workers' compensation practice group is ready, willing and able to come and visit you for purposes of an in-house seminar which we can specifically design for you and your Team. All you need to do is contact me and we can get started on setting something up.



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To Submit Or Not Submit An MSA – That Is The Question?

By Brad Peterson, bpeterson@heylroyster.com

We have all dealt with the frustration of submitting an MSA to CMS only to see them deny the recommended amount and return with a much higher MSA amount. It is not mandatory that MSAs be submitted to CMS for review. CMS review and approval simply provides an assurance that the MSA funding was sufficient. Increasingly insurance carriers and self-insureds are choosing not to submit MSAs to the Center for Medicare and Medicaid Services (CMS) even though the proposed MSA meets review thresholds. A decision to not submit an MSA is frequently triggered in cases where the petitioner seems unlikely to need particular treatment in the future or petitioner has discontinued medications that CMS is likely to require in the MSA due to their being prescribed within the two years prior to preparation of the MSA. There are also instances wherein physicians conclude that future treatment is not likely, yet the MSA proposal sets forth substantial additional future treatment. Numerous questions need to be asked as you evaluate whether to submit your MSA to CMS for review.

What is the client's risk tolerance? Does the adjuster have supportive supervisors and management if an MSA is not included in settlement? What is the likelihood that the petitioner will in fact undertake future medical treatment as would be outlined in an MSA? Has the petitioner discontinued high cost medications in the last two years which they are unlikely to take in the future, but would be required costs included in an MSA? Has the treating physician/surgeon concluded that the petitioner is not likely to need future medical treatment for the injury-related condition and has this opinion been set forth in writing? Does the claim involve disputed body parts

where the workers' compensation carrier has not paid any prior medical expense? Is the settlement amount nominal enough that even if the insurer were required to pay double damages under the Medicare Secondary Payer Act, the exposure is relatively minor?

These and other considerations must be taken into account when addressing the issue of whether an MSA will be funded as a part of settlement involving a Class 1 or Class 2 beneficiary. One of the greatest problems we face is that of prescription medications. More often than not, in many instances we are seeing high cost prescriptions being included in MSAs for the petitioner's remaining life expectancy even though they are no longer taking the medication. The CMS standard is that such prescription expenses will be included if they have been taken by the petitioner within the previous two years. These potential future expenses may very well weigh heavily in favor of not including them in a MSA and not submitting to CMS. Let us assume that the petitioner had a rather severe injury such as a fracture that did not require surgery, but lead to the prescription of opioids. If those opioids were prescribed within the two years previous to preparation of the MSA, it is likely that the MSA vendor would include those opioids for life as that would be consistent with CMS policy for funding MSAs. Most reasonable people however would quickly conclude that the petitioner is highly unlikely to ever need future opioid treatment once the fracture fully heals.

In my opinion, a statement from the treating physician that future medical treatment or prescriptions are not reasonably likely to occur should suffice for protecting Medicare's interest without funding an MSA. Unfortunately, CMS policy is not that straight forward. Section 4.2 of the workers' compensation MSA Reference Manual provides that an MSA is not necessary as Medicare's interests are already protected if:

a) The facts of the case demonstrate that the injured individual is only being compensated for past medical expense (i.e. for services furnished prior to settlement;

b) There is no evidence that the individual is attempting to maximize the other aspects of settlement (*e.g.*, the lost wages and disability portions of the settlement) to Medicare's detriment; and

c) The individual's treating physician's conclude (in writing) that, to a reasonable degree of medical certainty, the individual will no longer require any Medicare covered treatment related to the work comp injury.

It must be remembered that the reference manual is neither law nor a regulation. It is a policy statement that does not have the binding force of law. A reasonable person, judge and jury could easily conclude that Medicare's interests are protected, consistent with the third element stated in Section 4.2, namely that a treating physician concludes to a reasonable degree of medical certainty that the individual will no longer require any Medicare covered treatments related to the work comp injury.

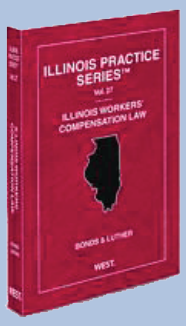
The submission issue has led to the development of an additional type of MSA that leads to a much more conservative future medical calculation. Generally referred to as an "evidence based" MSA, these products use evidence based medicine as well as established guidelines to support the omission of particular future treatments in the MSA.

In addition, MSA vendors and MSA consultants are beginning to promote the use of legal opinions as a means of protecting Medicare's interests and also protecting the employer and insurer with regard to Medicare Secondary Payer Act compliance. As with evidence based MSAs, legal opinions establishing whether an MSA is truly necessary to comply with the Medicare Secondary Payer Act are increasingly becoming viable options in addressing the MSA issue.

Brad Peterson – Champaign Office

Brad's practice is divided between workers' compensation, civil litigation and Medicare Secondary Payer Act compliance. He is experienced in the defense of construction and motor carrier liability, insurance coverage, workers' compensation, and Medicare Secondary Payer Act compliance. For over a decade Brad has had a special interest in Medicare Set-Aside Trusts and the Medicare Secondary Payer Act and has written and spoken extensively on these issues. Brad is a member of the ISBA Workers' Compensation Section Council where he served as Chairman in 2012-2013 and he is a past editor of the Workers' Compensation Section Newsletter. He currently serves as the contributing editor of the Workers' Compensation Report for the Illinois Defense Counsel Quarterly.

New 2018-2019 Edition Available



Bruce Bonds and **Kevin Luther** co-authored the recently released "Illinois Workers' Compensation Law, 2018 Edition," Volume 27 of the Illinois Practice Series published by Thomson Reuters. This publication provides an up-to-date assessment of Illinois workers' compensation law in a practical format that is useful to practitioners, adjusters, arbitrators, commissioners, judges, lawmakers, students, and the general public. It also contains a summary of historical developments of the Illinois Workers' Compensation Act.

Mr. Bonds concentrates his practice in the areas of workers' compensation, third-party defense of employers, and employment law. He is a member of the Illinois Workers' Compensation Commission's Rules Review and Revisions Committee and an adjunct professor of law at the University of Illinois College of Law, where he has taught workers' compensation law to upper-level students since 1998. Mr. Luther supervises the employment law, employer liability, and Workers' Compensation practices in the firm's Rockford and Chicago offices. He has represented numerous employers before the Illinois Human Rights Commission, arbitrated hundreds of workers' compensation claims, and tried numerous liability cases to jury verdict.

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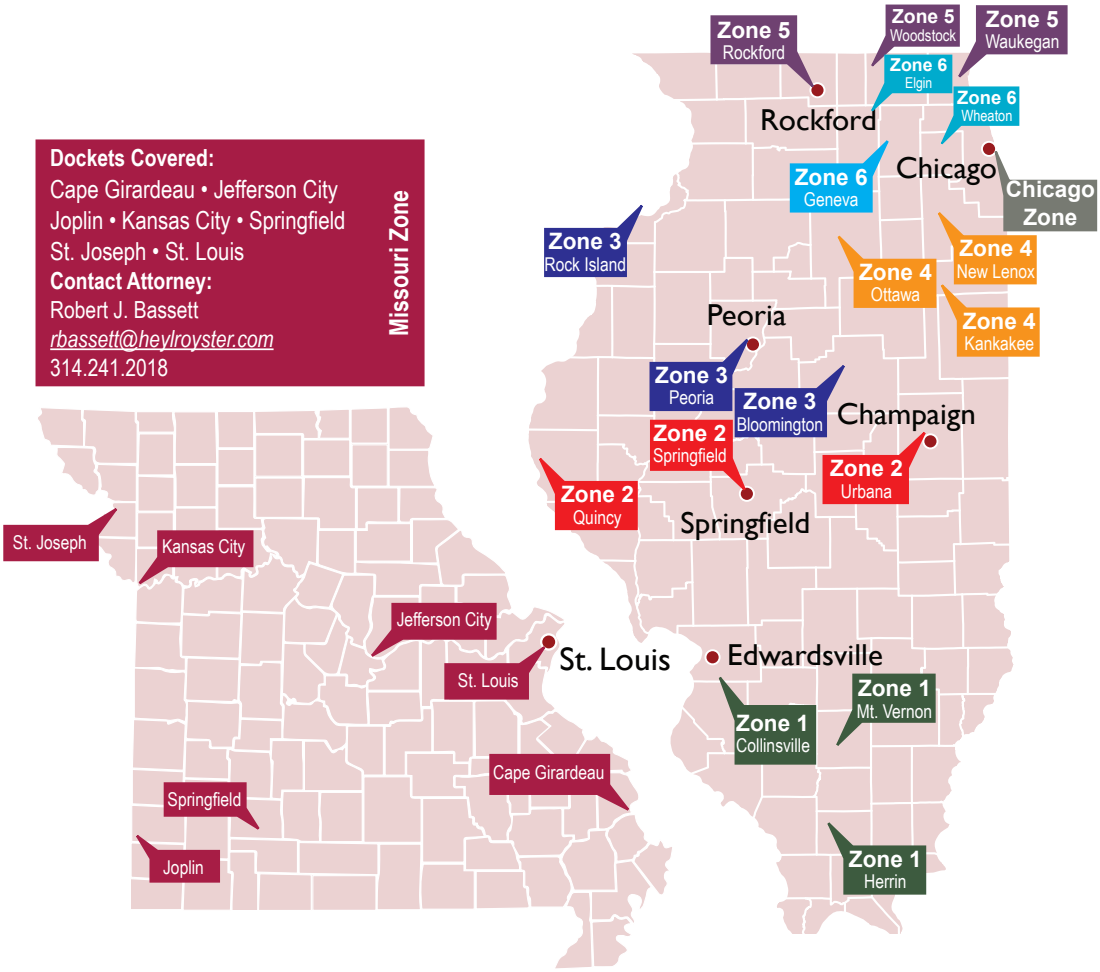

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